1993

United Park Associates, a Utah Limited Partnership v. Gump & Ayers Real Estate Inc. : Brief of Appellant

Utah Court of Appeals

Mark S. Swan; Richer, Swan & Overholdt; Attorneys for Plaintiff/Appellee.
Robert M. McDonald; McDonald, West & Benson; Attorneys for Defendant/Appellee.

930071

IN THE UTAH COURT OF APPEALS

UNION PARK ASSOCIATES, a Utah Limited Partnership, Plaintiff, vs. GUMP & AYERS REAL ESTATE, INC., Defendant.	: : : : : :	BRIEF OF THE APPELLANT Case No. 930071-CA Priority No. Priority No. 15

APPEAL FROM A FINAL ORDER OF THE THIRD JUDICIAL DISTRICT COURT

THE HONORABLE ANNE M. STIRBA, PRESIDING

Mark S. Swan
RICHER, SWAN & OVERHOLDT
Attorneys for Plaintiff/Appellee
311 South State Street
Suite 280
Salt Lake City, Utah 84111
Telephone: (801) 539-8632

Robert M. McDonald
McDONALD, WEST & BENSON
Attorneys for Defendant/Appellee
455 East 500 South
Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 359-0999

IN THE UTAH COURT OF APPEALS

UNION PARK ASSOCIATES, a Utah Limited Partnership,	:	BRIEF OF THE APPELLANT
Plaintiff,	:	
vs.	:	
GUMP & AYERS REAL ESTATE, INC.,	:	Case No. 930071-CA Priority No.
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Mark S. Swan
RICHER, SWAN & OVERHOLDT
Attorneys for Plaintiff/Appellee
311 South State Street
Suite 280
Salt Lake City, Utah 84111
Telephone: (801) 539-8632

Robert M. McDonald
McDONALD, WEST & BENSON
Attorneys for Defendant/Appellee
455 East 500 South
Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 359-0999

LIST OF PARTIES

Union Park Associates, a Utah limited partnership, Plaintiff and Appellee

Gump & Ayers Real Estate, Inc., Defendant and Appellant

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JURISDICTION OF THE COURT

This is an appeal from an interlocutory order dated August 25, 1992 (granting partial summary judgment on liability only) and a final Order and Judgment dated December 16, 1992. This Court has jurisdiction to hear this appeal pursuant to Utah Code Annotated § 78-2a-3(2)(h).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court abuse its discretion in denying Defendant's Motion to Amend its Answer to assert fraud in the inducement? The standard for review is whether the trial court abused its discretion in the circumstances of the case by refusing the amendment. Lloyd's Unlimited v. Nature's Way Marketing, Ltd., 753 P.2d 507 (Utah Ct. App. 1988).

2. Did the trial court err in granting Plaintiff's Motion for Partial Summary Judgment on liability despite evidence of the existence of fraud in the inducement? In reviewing such issue, all pleadings, evidence, admissions and inferences therefrom must be viewed in a light most favorable to Defendant/Appellant. Frederick May & Company v. Dunn, 368 P.2d 266 (Utah 1962); Durham v. Margetts, 571 P.2d 1332 (Utah 1977).

3. Did the trial court err in granting Plaintiff's Motion for Summary Judgment on damages based on a "per annum" interest
rate despite language in the Note stating a flat interest rate? The standard for review is the same as noted in paragraph 2.

4. Did the trial court err in denying Defendant's Motion for Partial Summary Judgment with respect to the interest rate? In reviewing such issue, all pleadings, evidence, admissions and inferences therefrom must be viewed in a light most favorable to Plaintiff/Appellee. See cases cited in paragraph 2.

DETERMINATIVE AUTHORITIES

Defendant does not contend any authorities are determinative of any issues involved in the appeal. However, the provisions of Utah Code Ann. § 15-1-3 have a bearing on the issues relating to the interest rate addressed in Points III and IV. The wording of Utah Code Ann. § 15-1-3 is as follows:

> Whenever in any statute or deed, or written or verbal contract, or in any public or private instrument whatever, any certain rate of interest is mentioned and no period of time is stated, interest

shall be calculated at the rate mentioned by the year.

STATEMENT OF THE CASE

NATURE OF CASE AND DISPOSITION IN LOWER COURT.

This is an action to enforce the provisions of a Promissory Note (R. 108-109) executed by Defendant (hereinafter "Gump & Ayers") pursuant to a Settlement Agreement (R. 104-106) which was intended to settle and compromise Gump & Ayers' liability to Plaintiff (hereinafter "Union Park")
for past and future rents under a pre-existing lease of real property.

Gump & Ayers executed the Settlement Agreement and Promissory Note in reliance on the prior representation of Union Park that the leased premises were still vacant with no prospects for a replacement tenant (R. 192). Thus, a portion of the principal of the Promissory Note was attributable to settle Union Park's claims for future rents under the lease (R. 194-195). If Gump & Ayers had known that the leased premises had already been re-let to replacement tenant, it would not have executed a Promissory Note for a principal sum in excess of the total of accrued rents (R. 192).

At the time Gump & Ayers filed its Answer, it had received information that the representations of Union Park were false, i.e., that the leased premises had already been leased to a replacement tenant prior to execution of the Settlement Agreement and Promissory Note (R. 195-196). Thus, Gump & Ayers had reason to believe that the Settlement Agreement and Promissory Note had been procured by fraud on the part of Union Park. However, after considering this information, counsel for Gump & Ayers, in a good faith effort to comply with Rule 11, U.R.C.P., refrained from asserting fraud as a defense until the information could be confirmed and corroborated (R. 195-196).

At a later point in the litigation, Gump & Ayers confirmed the accuracy of the information concerning fraud (R. 135-155). Accordingly, counsel for Gump & Ayers immediately moved the Court to amend Gump & Ayers' Answer to assert the defense of fraud in inducing the execution of the Settlement Agreement and Promissory Note (R. 235).

On August 25, 1992, the lower court denied Gump & Ayers' Motion to Amend, and granted summary judgment on the issue of liability under the Promissory Note despite clear evidence that execution of the Promissory Note was induced by fraud on

the part of Union Park (R. 470-472); (copy of the Order attached as Exhibit "C").

The Promissory Note provided: ". . . this Note shall bear interest at the rate of ten percent (10%) from and after May 1, 1988." (R. 108-109) There was no suggestion of a "per annum" interest rate. The Promissory Note, including the language relating to the interest rate, was unilaterally drafted by Union Park and its attorneys (R. 251).

On December 16, 1992, the lower court computed the judgment amount on the basis of an interest rate of 10% per annum and entered judgment in the sum of $35,157.59. At the same time, the lower court denied Gump & Ayers' Motion for Summary Judgment wherein Gump & Ayers sought a ruling that the interest rate should be limited to a flat rate of 10% (R. 606-608) (copy of Order and Judgment attached as Addendum Exhibit "D"). These rulings were made on the basis of the wording of the Note without consideration of extrinsic evidence. See transcript of Judge's bench ruling of November 30, 1992, p. 1 (R. 743-748) (copy of transcript attached as Addendum Exhibit "B").

FACTS RELEVANT TO LIABILITY UNDER THE PROMISSORY NOTE

On or about June 1, 1983, Gump & Ayers and Union Park entered into a Lease Agreement wherein Gump & Ayers, as

lessee, leased approximately 4,497 square feet of office space in a building owned by Union Park at Union Park Center in Midvale, Utah. (Lloyd Affidavit, paras. 5, 6; Exhibit A, R. 54, 65-80). The Lease was for a period of ten years (Lloyd Affidavit, para. 6; Exhibit A R. 54, 65-80).

On or about June 28, 1985, the parties entered into a second Lease for an additional 912 square feet adjacent to the existing leased office space (Lloyd Affidavit, paras. 7,8; Exhibit B, R. 54-55, 81-102). The second Lease was intended to expire at or about the same time as the first Lease (Lloyd Affidavit, para. 9, R. 55).

The office space included in both of the leases will hereinafter be referred to as "subject premises."

Gump & Ayers is a licensed real estate broker engaged in the business of selling, purchasing and leasing real property. (Floor Affidavit, para. 2, R. 189). By reason of adverse conditions in the real estate market, Gump & Ayers determined that it must close several of its offices including the office at the subject premises (Floor Affidavit, para. 4. R. 190). Gump & Ayers substantially vacated the subject premises on May 28, 1988 (Floor Affidavit, para. 4, R. 190).

At the time it vacated the premises, Gump & Ayers was fully aware that it remained liable for future lease payment

obligations despite the fact that the subject premises had been vacated. Gump & Ayers was further aware that Union Park had an obligation to mitigate this liability by expending efforts to find a replacement tenant (Floor Affidavit, para. 5, R. 190-191). During the period beginning when the premises was vacated in May, 1988, and continuing through mid-November, 1988, there was frequent communication between Gump & Ayers and Union Park concerning their efforts to find a replacement tenant to occupy the vacant subject premises (Floor Affidavit, para. 5, R. 190-191).

Almost immediately after Gump & Ayers vacated the subject premises, Gump & Ayers contacted Matrix Funding Corporation (hereinafter "Matrix") in an effort to persuade it to occupy the subject premises and thereby decrease the ongoing liability of Gump & Ayers. Matrix was a co-tenant that occupied other space in the same building. Matrix expressed some interest in occupying the vacated premises (Floor Affidavit, para. 6, R. 191).

Gump & Ayers immediately notified Union Park of the interests of Matrix in occupying the vacated leased premises. However, at the time of the notice, Union Park indicated that they had already communicated with Matrix and Matrix was not

interested in occupying the vacant subject premises (Floor Affidavit, para. 6, R. 191).

In mid-November, 1988, Union Park initiated communication with Gump & Ayers concerning the subject premises. At that time Union Park represented to Gump & Ayers that the premises were still vacant, no prospective tenants had been located and invited Gump & Ayers to negotiate a lump-sum figure to finally settle and compromise Gump & Ayers' liability for past and future lease payments (Floor Affidavit, para. 7, R. 191-192). In reliance on the statements of Union Park, Gump & Ayers entered into negotiations to settle and compromise its liability for past and future rent payments (Floor Affidavit, para. 7, R. 191-192).

The negotiations between Union Park and Gump & Ayers resulted in a Settlement Agreement and Promissory Note dated December 7, 1988 (Floor Affidavit, para. 8, R. 102). A copy of the Settlement Agreement (R. 104-106) is attached as Addendum Exhibit "E". A copy of the Promissory Note (R. 108-109) is attached as Addendum Exhibit "F".

The Settlement Agreement and Promissory Note were intended to pay and discharge all liability of Gump & Ayers for lease payments that had accrued through November, 1988, together with an amount in excess of accrued lease payments in

settlement of liability for future lease payments accruing on the vacant premises (Floor Affidavit, para. 8, R. 192).

The accrued lease payments to November, 1988, totaled $52,613.82, (Floor Affidavit, para. 15, R. 194-195). The Settlement Agreement provided for the payment of $20,000 in cash (paid in two installments) in addition to the Promissory Note in the principal sum of $55,000 (Lloyd Affidavit, para. 18, R. 56-57). Thus, the sum of $22,386.18 of the settlement amount was attributable to compromising Gump & Ayers' liability for future lease payments ($75,000 - $52,613.82 = $22,386.18) (Floor Affidavit, para. 15, R. 194-195).

In negotiating the Settlement Agreement and Promissory Note, Gump & Ayers relied on the statements by Union Park that the premises remained vacant and the no prospective tenant had been located. This reliance prompted Gump & Ayers to agree to pay the $22,386.18 in excess of rental payments that had accrued to the date of the agreement (Floor Affidavit, paras. 9, R. 192).

After commencement of the instant litigation, Gump & Ayers learned that the subject premises had been leased to Matrix on November 23, 1988, two weeks <u>prior</u> to the date of the Settlement Agreement and Promissory Note (Floor Affidavit, para. 18, R. 195-196; Lloyd Affidavit, para. 28 (R. 60). The

Lease Agreement between Union Park and Matrix, bearing the date of November 23, 1988, is attached to the Affidavit of Thomas Lloyd as Exhibit "E" (R. 135-155). The Lease was later amended to expand the leased space on February 23, 1989 (R. 156-157).

If Gump & Ayers had known that the premises had been leased to Matrix on November 23, 1988, Gump & Ayers would not have agreed to pay sums in excess of accrued rental in compromise of their future rental liability (Floor Affidavit, paras. 9, 12, R. 192).

At the time Union Park asserted its first Motion for Summary Judgment (which was granted as to liability only), there had been no ruling on Gump & Ayers' Motion to Amend to assert fraud in inducing the execution of the Promissory Note. Accordingly, in an apparent attempt to demonstrate that Union Park's fraud was not material, Union Park asserted several

conclusory statements[1] to persuade the lower court that the fruits of its fraud should be ignored inasmuch as Union Park's losses in re-letting the premises to Matrix exceeded the fruits of the fraud. (See footnote 1).

This unsupported legal proposition that a perpetrator of fraud may justify the fraud upon a showing (to the extent conclusory statements constitute a "showing") of losses sustained by the fraudulent scheme was accepted by the lower court. See Transcript of Judge's ruling on January 10, 1992, (R. 436-448). A copy of the ruling is attached as Addendum Exhibit "A".

FACTS RELEVANT TO MOTION TO AMEND TO ASSERT FRAUD IN THE INDUCEMENT

On or about February 14, 1990, Jerry Floor (CEO of Gump & Ayers) attended a social gathering also attended by an

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[1] Union Park claimed that it was "forced" to agree with Matrix to relet the subject premises at a lower rental (Lloyd Affidavit, para. 28, R. 60) and that Union Park was "forced" to incur $18,559 for leasehold improvements on the subject premises (Lloyd Affidavit, para. 30, R. 60). On the basis of these conclusory statements, with no evidence as to the reasonable rental value of the premises, no evidence as to the reasonableness and necessity for the leasehold improvements, and with no deduction for the increase in the value of its asset by reason of the leasehold improvements, Union Park asserted losses of $50,665.41 in excess of the $75,000 it received from Gump & Ayers. (Lloyd Affidavit, para. 32, R. 61-62). There was no allowance for the enhanced value of Union Park's property (which would be realized at the termination of the lease) with respect to the capital improvements.

employee of Matrix. During the course of the conversation, the Matrix employee stated that Matrix had leased the premises previously occupied by Gump & Ayers and that Matrix had been in possession of the property since Gump & Ayers vacated the premises (Floor Affidavit, para. 11, R. 193). Gump & Ayers immediately confronted Union Park with this information and Union Park denied the accuracy of the information (Floor Affidavit, para. 11, R. 193).

At the time Gump & Ayers delivered the Summons and Complaint to its attorney, Gump & Ayers advised their attorney as to the information received from the Matrix employee that the subject premises had already been leased at the time of the execution of the Settlement Agreement and Promissory Note. Gump & Ayers' attorney determined that by reason of the circumstances under which the statement was made and the later denial by Union Park, the obligations imposed by Rule 11, U.R.C.P., precluded him from asserting the defense of fraud in the inducement without further verification (Floor Affidavit, para. 18, R. 195-196).

Gump & Ayers filed an Answer to the Complaint on or about December 13, 1990 (R. 14-17). By reason of counsel's views as to his obligations under Rule 11, U.R.C.P., fraud in the

inducement was not asserted as a defense. However, the Answer did contain the following:

> Defendant reserves the right to conduct discovery to determine if the Promissory Note was procured by fraud. In the event discovery produces evidence of fraud, Defendant reserves the right to amend this Answer to assert fraud in the inducement. (R. 16).

On or about February 25, 1991, Gump & Ayers received a copy of the Lease Agreement between Union Park Associates and Matrix with respect to the subject premises (hereinafter "Matrix Lease") (Lloyd Affidavit, Exhibit E, R. 135-155).

The Matrix Lease was dated November 22, 1988, more than two weeks prior to the Settlement Agreement and Promissory Note. The Matrix Lease involved 10,039 square feet which included the subject premises (Lloyd Affidavit, para. 28 (R. 60); Exhibit "E" (R. 135). Shortly thereafter the leased premises were extended. (R. 156-157).

Inasmuch as the Matrix Lease established that the subject premises had been leased prior to the Promissory Note and Settlement Agreement, the claim of fraud in the inducement of the Settlement Agreement and Promissory Note was sufficiently corroborated thereby justifying Defendant's counsel in formally asserting the defense of fraud in the inducement.

On March 21, 1992, Gump & Ayers filed a Motion to Amend

its Answer to assert the defense of fraud in the inducement (R. 235). The Motion to Amend further sought leave to file a Counterclaim asserting fraud (R. 235). The proposed Amended Answer (R. 238-241) asserted the defense of fraud in the Third Affirmative Defense (R. 240). The proposed Counterclaim (R. 243-248) also asserted affirmative claims based on fraud[2].

The Order of the Court dated August 25, 1992, denied the Motion to Amend thereby removing the issue of fraud from consideration in adjudicating Union Park's Motion for Summary Judgment. (R. 470-472). A copy of the Order of August 25, 1992, is attached as Addendum Exhibit "C".

FACTS RELEVANT TO INTEREST RATE

The Promissory Note executed by Gump & Ayers in the principal sum of $55,000 was prepared unilaterally by Plaintiff and/or its attorneys (Parsons Affidavit, para. 2, R. 251).

The Promissory Note prepared by Union Park contained the following provisions with respect to interest:

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[2] Gump & Ayers' Motion to Amend was initially granted on the grounds that Union Park had not opposed the Motion (R. 402). However, Union Park sought relief from the Order granting leave noting its opposition had been overlooked by the lower court (R. 404). The Order granting Gump & Ayers leave to amend was vacated on September 17, 1991, and the court stated it would reconsider the motion at a later date (R. 431). The Motion to Amend was later denied as noted in the text (R. 435; 470).

> FOR VALUE RECEIVED, the undersigned hereby promises to pay to the order of UNION PARK ASSOCIATES, 6925 Union Park Center, Suite 500, Midvale, Utah 84047, the sum of FIFTY FIVE THOUSAND AND NO/100 DOLLARS ($55,000). This Note shall bear interest at the rate of ten percent (10%) from and after May 1, 1988. (Emphasis added). (R. 108-109). See Addendum Exhibit "F".

There is no wording in the Promissory Note which suggests that the specified interest rate of 10% was a "per annum" rate.

The Order and Judgment dated December 16, 1992, denied Gump & Ayers cross motion for summary judgment seeking a declaration that the interest on the Promissory Note is a flat rate of 10% rather than a per annum rate. (R. 606-608). (Copy of Order is included in Addendum).

The final judgment dated December 16, 1992, granted Plaintiff interest computed at 10% per annum. See Transcript of ruling, R. 743-748, Addendum Exhibit "B". In entering the judgment, the lower court relied solely upon the wording of the Promissory Note without consideration of extrinsic evidence. Transcript of ruling (R. 744), Addendum Exhibit "B".

SUMMARY OF ARGUMENT

POINT I: At the time Gump & Ayers filed its Answer, it suspected it had been induced to execute the Promissory Note

and Settlement Agreement on the basis of fraudulent statements by Union Park. However, since the suspicions were based on hearsay statements and the statements had been denied by Union Park, Gump & Ayers refrained from asserting fraud in compliance with its obligations under Rule 11, U.R.C.P. When the facts confirming the existence of fraud were discovered, Gump & Ayers moved to amend its Answer and assert a Counterclaim based on such fraud. The lower court denied the Motion. Gump & Ayers asserts that such denial was an abuse of discretion.

POINT II: The lower court granted Union Park's Motion for Summary Judgment on the issue of liability under the Promissory Note despite evidence that the Promissory Note was procured by fraud. Gump & Ayers asserts that the lower court erred in granting summary judgment on liability in the face of evidence that established the Promissory Note was procured by fraud.

POINT III: The Promissory Note, drafted by Union Park and its attorneys, provided for interest "at the rate of ten percent (10%) from and after May 1, 1988." There was no mention of a "per annum" rate of interest. In its Complaint, Union Park did not assert any claim for reformation to include "per annum" in the body of the Promissory Note. Gump & Ayers

asserts that the lower court erred in granting judgment which included interest at the rate of 10% per annum.

POINT IV: By reason of the wording of the Promissory Note stated under POINT III, Gump & Ayers asserts that the lower court erred in denying Gump & Ayers' Motion for Summary Judgment seeking a declaration of a flat rate of interest under the Promissory Note.

ARGUMENT

POINT I
THE LOWER COURT ABUSED ITS DISCRETION IN DENYING GUMP & AYERS' MOTION TO AMEND ITS ANSWER AND TO ASSERT A COUNTERCLAIM BASED ON FRAUD.

As noted in the Statement of Facts, on December 7, 1988, Gump & Ayers entered into a Settlement Agreement and Promissory Note for the purpose of compromising Gump & Ayers' liability under prior leases of office space wherein Gump & Ayers was lessee and Union Park was lessor.

At all times prior to the execution of the Settlement Agreement and Promissory Note, Union Park had represented that the subject premises remained vacant with no prospects for a replacement tenant. Such statement was false, and was known to be

false at the time it was made, inasmuch as Matrix had leased the subject premises from Union Park two weeks earlier.

In reliance upon the representation that the subject premises were vacant, Gump & Ayers agreed to execute the Settlement Agreement and Promissory Note which provided for the payment of sums of money in excess of the rents that had accrued up to the date the Settlement Agreement and Promissory Note were executed.

On or about February 14, 1990, Gump & Ayers heard from an employee of Matrix, that Matrix had leased the subject premises prior to the execution of the Settlement Agreement and Promissory Note. Gump & Ayers immediately confronted Union Park with this information and Union Park categorically denied the truth of the statement.

At the time Gump & Ayers employed its counsel to represent it in this action, the statement of the Matrix employee was expressly mentioned. However, inasmuch as the statement was unconfirmed and had been previously denied by Union Park, and inasmuch as fraud is a serious allegation, counsel for Gump & Ayers determined that Rule 11, U.R.C.P., required restraint until the matter could be investigated.

There can be no colorable claim that counsel's restraint in asserting fraud was not mandated by Rule 11, which provides in pertinent part:

> The signature of an attorney or party constitutes a certification by him that

> he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact . . . and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. (Emphasis added).

In its Answer to the Complaint, based upon the information provided by Gump & Ayers, counsel for Gump & Ayers reserved his right to amend the Answer to assert fraud, stating:

> Defendant reserves the right to conduct discovery to determine if the Promissory Note was procured by fraud. In the event discovery produces evidence of fraud, Defendant reserves the right to amend this Answer to assert fraud in the inducement.

As the case progressed, Gump & Ayers obtained a copy of the lease between Union Park and Matrix describing the subject premises. The document clearly established that the subject premises had been leased to Matrix on November 23, 1988, two weeks prior to the Promissory Note and Settlement Agreement.[3]

On March 21, 1992, Gump & Ayers filed a Motion to Amend its Answer to assert a counterclaim alleging the fraud which was now confirmed. During the course of the hearing on

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[3] Gump & Ayers has not been able to determine if Matrix occupied the premises prior to the date of the written lease as stated by its employee.

January 10, 1992, the lower court denied the Motion to Amend. An Order formally denying said Motion was entered on August 25, 1992.

The denial of the Motion effectively removed all evidence of fraud from consideration by the lower court[4], resulting in the entry of summary judgment against Gump & Ayers on the issue of liability under the Promissory Note.

Rule 15, U.R.C.P., provides that leave to amend pleadings "shall be freely given when justice so requires." Gump & Ayers respectfully submits that under the circumstances of this case, justice required the granting of Gump & Ayers' Motion to Amend.

The ruling of the lower court imposes a burdensome and impossible dilemma upon attorneys when attempting to comply with Rule 11. The ruling in the instant case is tantamount to

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[4] The Transcript of the Court's ruling (R. 436-448, Appendix Exhibit "A") indicates the lower court gave consideration to the evidence supporting the fraud defense and appeared to rule that the fraud was either not material or was not sufficiently established. It is difficult to determine whether the denial of the Motion to Amend prevented close consideration of the evidence in support of the fraud defense, materially influenced consideration of such evidence or had no effect whatsoever in considering the evidence. However, inasmuch as the Motion to Amend was denied, it is presumed that the evidence of fraud was not seriously considered by the court. In any event, any comment on the evidence establishing fraud was dictum. Regardless of the impact on defenses to the Complaint, the counterclaim should have been granted which would preclude a final summary judgment in the matter.

a penalty against Gump & Ayers for its good faith compliance with Rule 11.

It is apparent that if Gump & Ayers had asserted fraud on the basis of the unconfirmed statement of the employee, and no fraud

had been found to exist, Gump & Ayers and its counsel would be defending a Rule 11 motion in this action.

This impossible dilemma imposed by the lower court should be removed by this Court by reversing the order of the trial court and mandating that amendments which are timely asserted after the parties comply with Rule 11 should be freely granted.

It should further be noted, apart from Rule 11 considerations, that at the time of the Motion to Amend was filed, discovery was uncompleted and no trial date had been established in the action. Thus, there was no basis to deny the Motion to Amend. In Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350 (Utah Ct. App.), Cert. Denied, 795 P.2d 1138 (Utah 1990), this Court held:

> In considering motions to amend pleadings, primary considerations are whether the parties have adequate notice to meet new issues and whether any party receives an unfair advantage or disadvantage. Accord, Bekins Bar V Ranch v. Huth, 664 P.2d 455 (Utah 1983).

It is respectfully submitted that the Order denying Gump & Ayers' Motion to Amend should be reversed, and the case remanded to the trial court so that the issues of fraud can be addressed by way of defense and counterclaim in connection with the issues relating to liability under the Settlement Agreement and Promissory Note.

POINT II.

THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN FACTS BEFORE THE COURT ESTABLISHED FRAUD IN CONNECTION WITH THE EXECUTION OF THE PROMISSORY NOTE.

As noted in the Statement of Facts, Gump & Ayers was induced to execute the Promissory Note and Settlement Agreement in reliance on statements by Union Park that the subject premises remained vacant with no prospects for a replacement tenant. The facts before the lower court established that such representations were false and were known to be false at the time they were made.

The amount of rent that had accrued to the date of the execution of the Settlement Agreement and Promissory Note was $52,613.82 (Floor Affidavit, para. 15, R. 194-195). The Settlement Agreement provided for the payment of $20,000 in cash (paid in two installments) in addition to the Promissory Note in the principal sum of $55,000 (Lloyd Affidavit, para. 18, R. 56-57). Thus, in reliance on the representations of

Union Park, Gump & Ayers was induced to agree to pay a total of $75,000 which was $22,386.15 in excess of the rents accrued to the date of the execution of the Settlement Agreement and Promissory Note ($75,000 - $52,613.82 = $22,386.15).

It is readily apparent that if Gump & Ayers had known that the subject premises had already been leased to a replacement tenant, it would not have agreed to pay funds in excess of the rents accrued to the date of the Settlement Agreement and Promissory Note.

A promissory note which is procured by fraud is voidable at the option of the person defrauded. Sugarhouse Finance Co. v. Anderson, 610 P.2d 1369 (Utah 1980); 37 Am. Jur. 2nd, Fraud and Deceit, § 8; State Insurance Fund v. Brooks, 755 P.2d 653 (Okla. 1988). Kaus v. Privette, 529 P.2d 23 (Wash. App. 1974); Havas v. Alger, 461 P.2d 857 (Nev. 1969); Terrill v. Laney, 193 P.2d 296 (Okla. 1948); Dahl v. Crain, 237 P.2d 939 (Ore. 1951). Moreover, the existence of fraud and related issues are questions of fact which must be resolved by the jury. Berkeley Bank v. Meibos, 607 P.2d 798 (Utah 1984); Christopher v. Larson Ford Sales, Inc., 557 Pl2d 1009 (Utah 1976).

In the lower court, Union Park attempted to circumvent the fraud allegations by asserting that the fraudulent scheme

should be ignored because the fruits of the fraud were overcome by losses in connection with the lease to Matrix. In this regard, Union Park asserted it was "forced" to re-let the premises to Matrix at a lower rental (R. 60) and that it was "forced" to incur $18,559 for leasehold improvements (R. 60), thereby making its fraud immaterial. On the basis of these conclusory statements, Union Park claimed that it lost $50,656.41 in excess of the $75,000 it received from Gump & Ayers (Lloyd Affidavit, para. 28-32, R. 60-63). It appears the trial court accepted these conclusory statements as a basis for ruling that the fraud on the part of Union Park was not material. See Transcript of Judge's ruling (R. 436-448) Addendum Exhibit "A".

The acceptance by the trial court of these conclusory statements was erroneous. Conclusory statements are insufficient to support a summary judgment. Walker v. Rocky Mountain Recreation Company, 508 P.2d 538 (Utah 1973); Albrecht v. Uranium Services, Inc., 596 P.2d 1025 (Utah 1979). Furthermore, there is no authority in support of an argument that the fruits of fraud should be ignored when other "losses" exceed the fruits of the fraud. Such a ruling is clearly contrary to public policy.

Even if the conclusory statements asserted by Union Park could be considered in ruling on a motion for summary judgment, the lower court still committed error in granting the summary judgment motion on the basis of such statements inasmuch as all of the elements of fraud, including materiality of the fraud, are factual questions that should be resolved by a jury. Christopher v. Larson Ford Sales, Inc., 557 P.2d 1009 (Utah 1976); Berkeley Bank v. Meibos, 607 P.2d 798 (Utah 1984); Lewis v. White, 269 P.2d 865 (Utah 1954).

The conclusory statements that Union Park was "forced" to lease the subject premises at a lower rent and "forced" to make capital improvements were addressed in Interrogatories served on Union Park. Union Park's Answers to the Interrogatories revealed that the conclusory statements were based on other conclusory and self-serving statements giving rise to a myriad of factual issues. See Answers to Interrogatories Nos. 3 and 4, Addendum Exhibit "G". It is apparent that Union Park has not established the claimed "losses" sufficiently to satisfy the requirements of a summary judgment procedure. Frederick May & Company v. Dunn, 368 P.2d 266 (Utah 1962).

There were no facts before the lower court which supported the conclusion that Union Park was "forced" to re-

let the premises at a lower rate or that it was "forced" to provide capital improvements. Furthermore, Union Park has failed and refused to rebut claims that it has affiliations with Matrix,[5] thereby providing an opportunity and incentive for less-than-arms-length-dealings with respect to reduced rents and capital improvements.

The Order of August 25, 1992, should be reversed and the case remanded to the lower court to conduct a trial wherein the defense and claims of fraud will be considered in connection with Gump & Ayers' liability under the Settlement Agreement and Promissory Note.

POINT III.

THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR "PER ANNUM" INTEREST UNDER THE PROMISSORY NOTE.

As noted in the Statement of Facts, the Promissory Note executed by Gump & Ayers in favor of Union Park provided as follows:

> FOR VALUE RECEIVED, the undersigned hereby promises to pay to the order of UNION PARK ASSOCIATES, 6925 Union Park

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[5] In opposing Union Park's first summary judgment motion, Gump & Ayers asserted that Union Park and Matrix were affiliated (R. 195). Thereafter, in written discovery, Gump & Ayers attempted to confirm such fact (Appendix Exhibit "G", Interrogatory No. 5). Union Park objected to the inquiry. (Ibid). The affidavits filed by Union Park in support of its Motion for Summary Judgment did not deny the claim of affiliation.

> Center, Suite 500, Midvale, Utah 84047, the sum of FIFTY FIVE THOUSAND AND NO/100 DOLLARS ($55,000). This note shall bear interest at the rate of ten percent (10%) from and after May 1, 1988. (Emphasis added).

The evidence established that Union Park's attorney unilaterally drafted the provisions of the Promissory Note. It is apparent that if Union Park had intended the interest rate to be "per annum" rate, Union Park could easily have inserted the appropriate wording. The wording selected by Plaintiff clearly specifies a "flat" interest rate to be charged "from and after May 1, 1988."

The lower court held that the wording of the Promissory Note was unambiguous and granted Union Park's summary judgment without consideration of extrinsic evidence submitted by both parties. Transcript of Court's ruling on November 30, 1992 (R. 743-748), Addendum Exhibit "B"[6]. Neither party has

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[6] On page 4 of the Transcript (R. 746, lines 19-23), counsel for Gump & Ayers attempted to confirm that the court did not refer to extrinsic evidence on the interest question. However, it appears there is an error in the Transcript. Gump & Ayers believes that the words "this decision was made out of the consideration of the extrinsic evidence" should have been "this decision was made without consideration of the extrinsic." Gump & Ayers has requested the reporter to review her notes with respect to this aspect of the Transcript. At the time of the filing of this Brief, the reporter had not completed the review. In the event the error is confirmed by the reporter, Gump & Ayers refers the Court to the corrected Transcript.

challenged that aspect of the lower court's ruling. Thus, the issue before this Court, with respect to the interest rate, is determined on the basis of the above-quoted language of the Promissory Note.

Gump & Ayers respectfully submits that the wording of the Promissory Note is clear and unambiguous and compels the conclusion that the interest rate of ten percent (10%) is a "flat rate" and there is no justification for inserting the words "per annum" into the wording of the Note.

It is readily apparent that the decision of the lower court to re-write the Promissory Note to insert the words "per annum" into the paragraph relating to interest was contrary to the basic principles of contract law.

In Hal Taylor Associates v. Unionamerica, Inc., 657 P.2d 743 (Utah 1982), the Supreme Court of the State of Utah held:

> When a question arises regarding a written instrument, the first source of inquiry must be the document itself, considered in its entirety. . . . It is a long-standing rule in Utah that persons dealing at arm's length are entitled to contract on their own terms without the intervention of the courts to relieve either party from the effects of a bad bargain . . . This court will not rewrite a contract simply to supply terms which the parties omitted. (Emphasis added).

The only basis upon which a court should involve itself in altering or amending the terms and provisions of a written contract is when the party pleads and establishes a cause of action for reformation. Thompson v. Smith, 620 P.2d 520 (Utah 1980); Hottinger v. Jensen, 684 P.2d 1271 (Utah 1984). Union Park has not

pled a claim for reformation nor has Union Park established a basis for reformation.

In order for Union Park to establish grounds to add the words "per annum" to the terms and provisions of the Promissory Note, it must plead and establish the following:

> There are two basic grounds for reformation of written instruments which do not correctly state and embody the intention and pre-existing agreement of the parties to the instrument, namely, (1) mutual mistake of the parties and (2) ignorance or mistake of the complaining party coupled with or induced by the fraud or inequitable conduct of the other remaining parties. (Thompson v. Smith, supra at p. 523).

In this action Union Park has not pled or even suggested mutual mistake of fact or fraud on the part of Gump & Ayers. Moreover, inasmuch as Union Park drafted the Promissory Note, there is no possibility that Defendant fraudulently omitted the words "per annum" from the Promissory Note.

In the absence of a reformation claim and the failure to establish any grounds for reformation, there is no basis for the Court to rewrite the Promissory Note to provide for per annum interest.

One of the grounds for the lower court's decision to include per annum interest in the Judgment, was the provisions of Utah Code Ann. § 15-1-3, which provide as follows:

> Whenever in any statute or deed, or written or verbal contract, or in any public or private instrument whatever, any certain rate of interest is mentioned and no period of time is stated, interest shall be calculated at the rate mentioned by the year.

It is readily apparent that the statute is not available to amend the provisions of the Promissory Note which Union Park prepared. The statute addresses a situation where "no time is stated." In this regard, the subject Note clearly states a time period, i.e., "ten percent (10%) from and after May 1, 1988."

Accordingly, the statute does not permit the Court to rewrite the Promissory Note to insert provisions which Union Park chose to omit when it prepared the Promissory Note.

The Order and Judgment of December 16, 1992, should be reversed with a determination by this Court that the interest rate stated in the Promissory Note is a flat rate of ten

percent (10%) applicable to the period commencing on the date the Note was executed to the date the last installment payment was due and payable, with interest at the statutory rate thereafter.

POINT IV

THE LOWER COURT ERRED IN DENYING GUMP & AYERS' MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO THE INTEREST RATE

On October 1, 1992, Gump & Ayers filed a Motion for Summary Judgment seeking a ruling that its obligations under the Promissory Note were limited to a "flat" interest rate of ten percent (10%) rather than a "per annum" rate. (R. 566). In this regard, the flat six percent (6%) rate should be applicable to the period commencing on the date the Note was executed and ending on the date the last installment was due and payable, with statutory interest thereafter. The Order and Judgment of December 16, 1992, denied the Motion (R. 606-608, Addendum Exhibit "D").

On the basis of the wording of the Promissory Note and the authorities cited under Point III of this Brief, Gump & Ayers asserts that the lower court erred in denying the Motion for Partial Summary Judgment and that the Order and Judgment should be reversed thereby establishing the flat interest rate stated in the Promissory Note.

CONCLUSION

The denial of Gump & Ayers' Motion to Amend its Answer and to assert a counterclaim imposed a penalty on Gump & Ayers and its attorney for its good faith attempts to comply with the provisions of Rule 11. The Order of August 25, 1992, denying Gump & Ayers Motion to Amend should be reversed and the case remanded for trial on the issues raised by the proposed answer and counterclaim.

The Order of August 25, 1992, granting summary judgment on the issue of liability under the Promissory Note constituted an error in law by reason of the evidence that the Promissory Note was procured by fraud. The Order should be reversed and the case remanded for trial so that the issue of Union Park's fraud may be considered in connection with Gump & Ayers' liability under the Settlement Agreement and Promissory Note.

The Order and Judgment of December 16, 1992, should be reversed and the interest obligation established as stated in the Promissory Note.

DATED this 15th day of April, 1993.

RESPECTFULLY SUBMITTED,

MCDONALD, WEST & BENSON

By _____
Robert M. McDonald

ADDENDUM

Tab A

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * * * * * *

UNION PARK ASSOCIATES Plaintiff, vs. GUMP & AYERS REAL ESTATE, INC. Defendant.	Transcript of: JUDGE'S RULING Case No. 900906725

The above-entitled cause of action came on regularly for hearing before the Honorable Anne M. Stirba, a Judge of the Third Judicial District Court of the State of Utah, at Salt Lake County, Utah, on Friday, January 10, 1992.

APPEARANCES

For the Plaintiff: MARK S. SWAN
RICHER, SWAN & OVERHOLT
311 South State #350
Salt Lake City, Utah

For the Defendant: ROBERT M. McDONALD
McDONALD & BULLEN
455 East 500 South #200
Salt Lake City, Utah

FRIDAY, JANUARY 10, 1992

JUDGE'S RULING

THE COURT: All right. Thank you, counsel. I appreciate your arguments and the thoroughness in which you presented this this afternoon. I have considered this and, as I told you before, I have read the memoranda and voluminous pleadings that have been submitted on this case.

This is the Plaintiff's Motion for Summary Judgment to enforce a settlement agreement that was entered into by the parties at the time that the defendant terminated the lease unilaterally. Frankly, I have given the fraud claim considerable thought. I am frankly persuaded that if any misrepresentations were made, that under these facts the defendant has not shown by clear and convincing evidence that the misrepresentations were material for the reasons argued by the plaintiff's counsel, but here and in its pleadings.

This is a rather unusual kind of a ruling, I think, in these kinds of actions but there is a burden on the defendant to show by clear and convincing evidence that fraudulent misrepresentations were made or omissions in the face of the duty to speak. I am not convinced that there were misrepresentations, but there is some evidence to the contrary. And so on that point, plaintiffs would not be entitled to summary judgment alone. But it seems to me

that that, under all of the facts, including the contractual obligations which the defendants submit they did owe at that time, both having already accrued and what they were exposed to, and in light of the damages amounts that the plaintiffs did suffer as a result of the termination of the lease, and cost associated with re-letting, and all of that, when you look at all of the numbers that are involved, I just don't see this as material. I don't think that the defendants have met their burden of showing by clear and convincing evidence that there was fraud in the inducement in this action. For that reason then, I am not inclined to accord that view and would rather on the issue of liability grant summary judgment in favor of the plaintiff.

Now, there are contested issues as to the amount of interest owing, whether it is ten percent or ten percent per annum; and we haven't addressed that today. Also, if there is any dispute about attorney's fees, we will need to deal with that as well. So, counsel, I would like you to address the issue of damages at this time, procedurally, just how you would like the Court to resolve that.

MR. SWAN: Well, to be frank, Your Honor, I have not done any legal analysis of construction of interest rates when it is not -- when the phrase "per annum" is not set forth in the note. It would be my suspicion because of my practice, and I do this quite a bit, that that is a

phrase or an understanding of the note that the Court can infer, otherwise it is not sensical. Calculate interest on some kind of period. And I think we can show by the way that the defendants were calculating their own payments and by their own affidavit, they show how much they were paying. They were calculating it on a per annum basis. For instance, they owed their first payment so many months after the execution of the note. They paid the principal amount due, plus the accrued interest portion and that calculation is quite simple. It was ten percent per annum is what they were using. And so, I think that there is a clear showing by the conduct of the parties that there was a meeting of the minds that that meant a yearly basis.

If the Court would like me to brief how the Court is supposed to construe that, I can do the calculation right here and show you that that is how they construed it themselves based upon their own affidavit.

THE COURT: I don't know that we are going to get this issue resolved today and I don't know on what other points the defendants might disagree with the amount of damages. I think the better way to handle this, unless Mr. Mc Donald has got a better idea, is to submit your judgment on the issue of liability and set forth the amount of damages. And if Mr. Mc Donald objects to that, then we can have a hearing on that. Unless, Mr. Mc Donald, do you

have another suggestion?

MR. MC DONALD: The problem that I have, Your Honor, and it is inherent in the ruling that has been made by the Court and that is this: that the case has been presented as a case for summary judgment on a note. It has been decided on the basis of something that I didn't regard as being an issue and that was their calculations of what would be due without the note. That isn't an issue that was raised to be addressed. There were substantial factual disputes with the manner in which they claimed this. When you say there is only 3,000 in dispute --

THE COURT: No, no. I am not talking about that. I am not talking about the amount of the note itself. The issues that I really see that remain unresolved as to damages, are the interest figure, attorney's fees and costs. I don't see, you know, the basic underlying amount of the promissory note as remaining at issue.

MR. MC DONALD: Well, in light of the Court's decisions, it is not. The problem I had with it is, and I guess maybe -- now that I hear the Court's basis for non-materiality, it is based upon a finding that their calculation of what would be due without the note are correct.

THE COURT: That I used as an overall context. However, my ruling, my finding, was assuming there were

misrepresentations that were made, they are not material to the promissory note and the negotiations of the promissory note. And I find that because I felt that the defendants has by law the burden of proof, rather heavy burden of proof to show by clear and convincing evidence that they were in fact material, and I didn't see that that burden had been met.

Now the only issues that I do see that remain to be resolved are whether the interest was per annum and as to that, I didn't focus on that as we prepared here today. But there is obviously contention about who drafted this note and therefore, you know, this may come down to a ruling of construction, you know, as to who drafted the note and whether it was ten percent or --

MR. MC DONALD: It is parol evidence.

THE COURT: Maybe it is parol evidence, but I think that that issue is an issue that remains in my mind and then the issue of attorney's fees and costs. Those are the only issues that I see that remain.

MR. MC DONALD: Well, I can't conceive of how we can resolve those issues on summary judgment. So maybe we can attempt. I will certainly attempt to resolve this in light of the Court's ruling so we don't have to come back, but I can't conceive of how we can in this circumstance start resolving factual disputes.

THE COURT: Well, I am just looking for a procedural mechanism in which to resolve it. That is all. And if it is something that is reserved for trial because it can't be resolved in a summary fashion, then so be it because that is the way it will come out.

However, I would like to address at least a couple of the other motions. I think with regard to the issue of damages, I am granting summary judgment on the issue of liability as requested in plaintiff's motion. I am not resolving today, I am not ruling on the issue, deciding one way or the other on the issue of damages. And that issue remains alive. If you want to make a specific motion on the issue of damages, attorney's fees and costs, then you may do so, or if you are not able to resolve that by discussions between the two of you, otherwise it is considered preserved for trial if no motion is filed.

And with regard to the other pending motions, as to the Motion to Amend, implicit in my ruling is that I would deny the Motion to Amend to allege a counterclaim setting forth fraud as a cause of action.

MR. MC DONALD: You are denying the Motion to Amend?

THE COURT: That is correct, and in so doing I don't find that it was unreasonably -- or rather, that it was untimely. I think that it was early enough in the

lawsuit, but rather I looked to the substantive issue of fraud and it doesn't make any sense to me that having found that -- I don't see that when the issue has been framed as to the claims of fraud, that there has been clear and convincing evidence to show, that it would make sense then to turn around and say, "Okay, now, amend your Answer and include the counterclaim on this very issue that I just said wasn't clear and convincing at this point." That is why I am denying the Motion to Amend.

MR. MC DONALD: The problem I have, if the Motion to Amend is not granted, then fraud isn't before the Court on summary judgment.

MR. SWAN: It is in the way of the affirmative defense on how to defend a motion.

THE COURT: Well, you defend it on that basis and I considered it in that context. It was a pending motion I reserved on that. I indicated I had read all of the pleadings about it. Motion to Amend is denied.

Now, are there any other motions that we need to deal with today?

MR. MC DONALD: I think the others would be moot now.

MR. SWAN: I believe so, Your Honor. The Motion to Strike the Affidavit of John Parsons, that was submitted in the support of their opposition memorandum. Our motion

for Protective Order is probably moot since there is no need for discovery. Just so the Court knows, we have answered that discovery belatedly to try to get this matter cleaned up and maybe settle this case. So it was made moot by our own response to their discovery except for maybe their response for attorney's fees. I don't know.

Motion to compel, I think that is made moot. They had a Motion to Strike our supplemental affidavits and I think the Court has allowed those appendix implicit in its ruling and been willing to consider those. I think those are all moot.

THE COURT: Very well. Is there anything else then, counsel?

MR. MC DONALD: Will you prepare an Order? (Talking to Mr. Swan.)

THE COURT: Yes. Mr. Swan, I want you to prepare a judgment and Order in accordance with the ruling this afternoon, and do you need a scheduling in case?

MR. SWAN: For a trial?

THE COURT: No, I wouldn't set it for trial. Just in terms of a discovery cut-off, if you are not completed and cut-off for any other motions.

MR. SWAN: Well, it would be my hope that based upon this Court's ruling of liability, that Mr. McDonald and I can get together and resolve this issue on damages.

If his client still wants to fight, then maybe we will do those. I don't know what the position is going to be.

THE COURT: Why don't you do this-- Oh, go ahead, Mr. Mc Donald.

MR. MC DONALD: Why don't we address that? Obviously, neither of us have had an opportunity to think in the new context of the case. I would suggest that if in fact we are unable to agree and you think it is a summary judgment issue, we should file a supplemental or a different motion so we can now address what we didn't know we were going to have to address today. In the meantime, we will attempt to resolve it in light of the Court's ruling reserving all appeal rights and so forth so we can bring it to a conclusion.

THE COURT: Well, do you see the need to do any additional discovery or you are just not prepared to analyze that?

MR. MC DONALD: Well, I don't think we will know that until we can determine whether we can resolve the damage issue. If the damage issue can be resolved, the case is over unless there is an appeal filed.

THE COURT: Why don't you do this. If you see the need for -- if you are not able to resolve it satisfactoriy between yourselves, then why don't you on or before December 31st to file a proposed scheduling --

MR. MC DONALD: You mean January?

THE COURT: What did I say?

MR. MC DONALD: December.

THE COURT: I am looking at January and said December. File by January 31st a proposed schedule and all I want you to include in that is discovery cut-off and about two weeks after that a motion -- a cut-off for any other dispositive motions you might have. And about a week after that, if no dispositive motions are filed, then a date by which one of you would file a Certification of Readiness for Trial. And at that point, then we will have a scheduling conference and schedule a final pretrial and trial. But don't do that unless you find it necessary. In other words, if you can't resolve it otherwise.

MR. SWAN: One of my concerns, Your Honor, is I am going to -- cause I don't take as copious of notes as I should when you rule, I am probably going to require a transcript of the ruling portion of this hearing, so I can make sure I have got everything in the Order. I don't know how long it will take to get something in order to present something to Mr. Mc Donald.

THE REPORTER: I can do it right away.

THE COURT: Dorothy says she can do it right away.

MR. SWAN: Then we should be able to meet that deadline.

THE COURT: If you can, fine. I am not so concerned about January 31st as I am if you -- if you are not able to resolve it, then let's get a scheduling in place and then we can get this matter resolved.

MR. MC DONALD: In light of the unknown, why don't we just have it at such a time as we find we are unable to negotiate, if we can. We will just file for a scheduling conference and will go from there.

MR. SWAN: My anticipation if we can't agree on this interest rate issue, then I will file a Motion for Summary Judgment on that issue. I am pretty confident I think I know what the law is.

THE COURT: All right. The final ruling will be this, in order to give you a little more time, if you are not able to resolve this then by February 14th, and that is more than a month down the road, if you are not able to resolve it by then, then submit a proposed schedule if you can agree on one. Okay?

MR. MC DONALD: Otherwise, move for a scheduling conference?

THE COURT: Well, no, just submit your respective one. I don't think we need to have another hearing about that. I am just looking for the easiest way to get that done.

MR. MC DONALD: All right, thank you, Your Honor.

THE COURT: Thank you.

* * * * *

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, DOROTHY L. TRIPP, C.S.R., do hereby certify:

That I am one of the Official Court Reporters of the Third District Court of the State of Utah.

That on Friday, January 10, 1992, I reported the testimony, and/or proceedings, to the best of my ability on said date in the above-entitled matter, presided over by the Honorable Anne M. Stirba in the Third District Court of Salt Lake County, State of Utah; and that the foregoing pages, numbered from 1 to 11, inclusive, contain a full, true and correct account of said proceedings of Judge's Ruling to the best of my understanding, skill and ability on said date.

Dated at Salt Lake City, Utah this 14th day of January, 1992.

Dorothy L. Tripp

Dorothy L. Tripp, C.S.R.
Official Court Reporter
License No 74-1801-8

Tab B

ORIGINAL

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * *

UNION PARK ASSOCIATES, a Utah Limited Partnership, Plaintiff, v. GUMP & AYERS REAL ESTATE, INC., Defendant.	Case No. 900906725 CV Transcript of: JUDGE'S BENCH RULING on Plaintiff's Motion for Summary Judgment

* * *

BEFORE THE HONORABLE JUDGE ANNE M. STIRBA

Salt Lake City, Utah

Monday, November 30, 1992

APPEARANCES

For the Plaintiff: MARK S. SWAN
Attorney at Law
Richer, Swan & Overholt
311 South State Street, #350
Salt Lake City, Utah 84111

For the Defendant: ROBERT M. McDONALD
Attorney at Law
McDonald, West & Benson
455 East 500 South, #200
Salt Lake City, Utah 84111

REPORTER: SUZANNE WARNICK, CSR, RPR-CM
Official Court Reporter
240 East 400 South, #304
Salt Lake City, Utah 84111
Phone: 801-535-5470

EXHIBIT B
ALL-STATE LEGAL SUPPLY CO.

MONDAY, NOVEMBER 30, 1992; P.M. SESSION

J U D G E ' S B E N C H R U L I N G

THE COURT: Thank you, counsel.

I reviewed the motions and all the memoranda that have been submitted and the affidavits, and I am prepared to rule at this time on the motions. There are two motions before the Court: The Plaintiff's Motion for what is essentially a partial motion or a Motion for Partial Summary Judgment and the Defendant's Motion for Partial Summary Judgment.

The specific issue first to be resolved is the construction of the interest rate in the promissory note. Now, parties to a contract such as this are not entitled to a better contract than the one that they entered into. And having said that, it is incumbent upon the Court to make a first determination that in a contract dispute whether the underlying contract, in this case the promissory note, is clear and unambiguous.

And in this particular case, the language that is relevant to the interest rate makes no mention of a per annum interest rate. It doesn't make mention of a flat rate interest rate either. I don't think there is any ambiguity about that contract in and of itself, just that it's missing a term.

It seems to me that in looking at that, and also looking at the other language, "interest to accrue," or the

accruing language only makes sense if this contract was to provide for per annum interest rate. So then you have one part of the contract, the note, making reference to "accruing." It does only make sense if there is a per annum rate, I believe, as a matter of law, and yet there is no mention of whether the rate is to be a flat rate or an accruing rate. If it were a flat rate, then you might even have an ambiguous note, but that's not really the issue before the Court.

The plaintiff relies on the statute which sets forth what is to happen when parties, public or private, to deeds and other documents mentioned in that have not mentioned whether a rate -- how a rate is to be calculated, at least when there is no rate that's mentioned. And I paraphrase in very rough fashion the statute.

As I look at the statute, in looking at this promissory note, it appears to me that the plaintiff's position is well taken. That the statute does control in this case, does provide the Court the justification for inserting a term in a contract. The parties are not entitled to a better contract than the one that they entered into, and generally courts do not imply terms or read terms or add terms to a contract. But in this case I think the legislature has done just that.

And therefore, for those reasons and the other reasons set forth by Mr. Swan on behalf of the plaintiff, I am

going to grant partial summary judgment in favor of the plaintiff and deny that aspect of summary judgment on behalf of the defendant.

Then as to the question of late fees and attorney's fees, the contract provided for the payment of late fees when payments were, in fact, late. And it appears to me as I look at that, that the contract is clear and unambiguous, that late fees were to apply. And finally with regard to attorney's fees, clearly attorney's fees are appropriate for enforcing the rights under that promissory note. In this case the plaintiff has prevailed on the issues that it has advanced. And consistent with that provision, the Court also grants summary judgment on the issue of attorney's fees.

And there has not been -- well, in any event, for those reasons I am going to grant summary judgment as prayed for by the plaintiff and deny it as to the defendant.

Is there anything I have overlooked?

Counsel.

MR. McDONALD: In preparing the order I take it that we can insert that, so there is no question as to the basis of the Court's decision, that this decision was made out of the consideration of the extrinsic evidence.

THE COURT: That is correct.

MR. SWAN: Your Honor, you have called it a partial summary judgment. I believe this resolves all the issues.

It's only partial because there was a prior partial, but it's a final judgment as far as all the issues.

THE COURT: That's my understanding, Mr. Swan. I want you to prepare an order for this Motion for Summary Judgment. I want you to prepare a judgment consistent with all these rulings.

Now, you do not have to prepare findings of fact. That's not required by law. Sometimes you get into more arguments over what was found and what wasn't. I do want to say that when I make a ruling from the bench, I try to hit on the highlights of the bases for the Court's decision. I don't mean those remarks to be all-inclusive. And I have now adopted the practice of at least trying to remember to say, "and for other reasons set forth," so that those reasons that are consistent with the Court's ruling can also be considered. But I did find those arguments of the plaintiff persuasive under the facts of the case and in looking at that note and that statute.

MR. SWAN: Thank you, your Honor.

THE COURT: Thank you, counsel.

(This concludes the Judge's Bench Ruling.)

* * *

C E R T I F I C A T E

STATE OF UTAH)
:
COUNTY OF SALT LAKE)

I, SUZANNE WARNICK, CSR, RPR-CM, do certify that I am a Certified Shorthand Reporter, Registered Professional Reporter with the Certificate of Merit, and a Notary Public in and for the State of Utah.

That at the time and place of the proceedings in the foregoing matter, I appeared as the court reporter in the Third Judicial District Court for the Honorable Judge Anne M. Stirba, and thereat reported in stenotype all of the proceedings had therein.

That thereafter, my said shorthand notes of the Judge's Bench Ruling were transcribed by computer into the foregoing pages; and that this constitutes a full, true and correct transcript of the same.

WITNESS MY HAND AND SEAL in Salt Lake City, Utah on this, the 23rd day of January, 1993.

Suzanne Warnick, CSR, RPR-CM

SUZ[illegible]ICK
[illegible] South
Sou[illegible]
My Commission Expires
April 1, 1995
State of Utah

My commission expires:
1 April 1995

Tab C

Mark S. Swan - 3873
Mark E. Medcalf - 5404
RICHER, SWAN & OVERHOLT, P.C.
A Professional Corporation
311 South State Street
Suite 280
Salt Lake City, Utah 84111
Telephone: (801) 539-8632
Attorneys for Plaintiff
Union Park Associates

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

UNION PARK ASSOCIATES, a Utah Limited Partnership, Plaintiff, vs. GUMP & AYERS REAL ESTATE, INC., Defendant.	**ORDER** Civil No. 900906725 CV Judge Anne M. Stirba

---

Plaintiff's Motion for Summary Judgment came on regularly for hearing on January 10, 1992 at 2:00 p.m. before the Honorable Anne M. Stirba, one of the Judges of the above-entitled Court. Plaintiff, Union Park Associates, was represented by its counsel of record, Mark S. Swan of the law firm Richer, Swan & Overholt, P.C. Defendant Gump & Ayers was represented by its counsel of record, Robert M. McDonald of the law firm McDonald & Bullen. The Court having reviewed the pleadings on file herein, having heard oral

argument of counsel, and for good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED & DECREED as follows:

1. Plaintiff's Motion for Summary Judgment is hereby granted against Defendant Gump & Ayers as to liability only. The issues of the calculation of damages and attorney's fees are reserved for further ruling by this Court.

2. Defendant's Motion to Amend its Answer and assert a Counter-Claim is hereby denied with prejudice.

3. Plaintiff's Motion for Relief from Order is hereby granted.

4. All further Motions before this Court are deemed to be moot based upon the Court's ruling herein.

DATED this 25th day of ~~July~~ August, 1992.

BY THE COURT:

HONORABLE ANNE M. STIRBA
Third District Court Judge

Civil No. 900906725 CV
Judge Anne M. Stirba

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of ~~July~~ August, 1992, I caused a true and correct unsigned copy of the foregoing to be served upon the following parties by placing the same in the United States mails, postage prepaid, addressed as follows:

Robert M. McDonald
McDONALD & BULLEN
The Hermes Building
455 East 500 South
Suite 200
Salt Lake City, Utah 84111

te020266.c92

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Tab D

Mark S. Swan - 3873
Mark E. Medcalf - 5404
RICHER, SWAN & OVERHOLT, P.C.
A Professional Corporation
311 South State Street
Suite 280
Salt Lake City, Utah 84111
Telephone: (801) 539-8632
Attorneys for Plaintiff
Union Park Associates

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

UNION PARK ASSOCIATES, a Utah Limited Partnership,	:	**ORDER AND JUDGMENT**
Plaintiff,	:	
vs.	:	
GUMP & AYERS REAL ESTATE, INC.,	:	Civil No. 900906725 CV
Defendant.	:	Judge Anne M. Stirba

The hearing on Plaintiff's Motion for Summary Judgment and Defendant's Motion for Summary Judgment came before the above-entitled Court on November 30, 1992 at the hour of 2:00 p.m. Plaintiff was represented by its counsel of record, Mark S. Swan of the law firm Richer, Swan & Overholt, P.C. Defendant was represented by its counsel of record, Robert M. McDonald of the law firm McDonald, West & Benson. The Court having reviewed the Plaintiff's Motion for Summary Judgment with supporting

documentation and the Defendant's Motion for Summary Judgment with supporting documentation, and after hearing oral argument thereon and after being fully advised in the premises and based upon the Court previously entering an Order of Partial Summary Judgment which was entered on August 25, 1992 establishing the Defendant's liability to Plaintiff, and the Court having made its ruling from the bench, hereby orders as follows:

1. Defendant's Motion for Summary Judgment is denied with prejudice.

2. Plaintiff's Motion for Summary Judgment on the issues of the calculation of damages and attorney's fees is hereby granted.

3. Plaintiff is awarded Judgment as against the Defendant in the amount of $35,157.59 as of July 9, 1990 with interest accruing thereon at the rate of 10% per annum thereafter until paid in full.

4. Plaintiff is further awarded a Judgment against Defendant in the sum of $110.50, representing the costs incurred herein and the sum of $7,110.00, representing attorney's fees expended herein, for a total of $7,220.50, plus interest thereon at the contract rate of 10% per annum from the date of the entry of this Judgment until paid in full.

5. It is further Ordered that this Judgment shall be

augmented in the amount of costs and attorney's fees expended in collecting said Judgment, by execution or otherwise, as shall be established by Affidavit.

DATED this 16th day of December, 1992.

BY THE COURT:

HONORABLE ANNE M. STIRBA
Third District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of December, 1992, I caused a true and correct copy of the foregoing to be served upon the following parties by hand delivering the same, addressed as follows:

Robert M. McDonald
McDONALD, WEST & BENSON
Attorneys for Defendant
The Hermes Building
455 East 500 South
Suite 200
Salt Lake City, Utah 84111

te023049.c92

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Tab E

SETTLEMENT AGREEMENT
AND
MUTUAL RELEASE OF CLAIMS

This Settlement Agreement and Mutual Release of Claims is entered into this 7th day of December, 1988, by and between Union Park Associates (hereinafter, "Union Park") and Gump & Ayers Real Estate, Inc. (hereinafter, "Gump & Ayers").

1. On June 28, 1985, Union Park, as landlord, and Gump & Ayers, as tenant, entered into a certain Lease Agreement for the lease of approximately 912 sq. ft. of the second floor of the office building located at approximately 1150 East Fort Union Boulevard, Midvale, Utah. That Lease Agreement provides for a term of eight years and eight months. A copy of said Lease is attached hereto as Exhibit "B"

2. On June 1, 1983, Union Park, as landlord, and Gump & Ayers, as tenant, entered into a certain Lease Agreement for the lease of approximately 4,567 sq. ft. of the second floor of the office building located at approximately 1150 East Forth Union Boulevard, Midvale, Utah. That Lease Agreement provides for a term of ten years and eight months. A copy of said Lease is attached hereto as Exhibit "C".

AGREEMENT AND RELEASE OF CLAIMS

In consideration of the mutual promises set forth below and with the intent of being legally bound, the parties hereto agree as follows:

3. Payment. Upon execution of this Agreement, (a) Gump & Ayers will pay to Union Park the sum of Ten Thousand Dollars ($10,000); (b) on December 15, 1988, Gump & Ayers will pay to Union Park an additional sum of Ten Thousand Dollars ($10,000); in addition, (c) Upon the execution of this Agreement Gump & Ayers will execute and deliver to Union Park a Promissory Note in the form attached hereto as Exhibit "A", and will pay to Union Park the additional sum of Fifty-Five Thousand Dollars ($55,000) on the terms, and in the manner, set forth in said Promissory Note.

4. Mutual General Releases. (a) For and in consideration of the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Union Park, for itself, its successors and assigns, does hereby fully and forever release, acquit and discharge Gump & Ayers, its successors, assigns and any others who have acted or who are acting on its behalf, from any and all claims, demands, obligations, liabilities, causes of action or any suits at law or equity, whether known or unknown to Union Park, which Union Park may have against Gump & Ayers which claims arise from any act or omission of Gump & Ayers committed prior to the date of this Agreement, the Lease Agreements specified in

EXHIBIT
E

Paragraphs Nos. 1 and 2, above, the occupation of the leased premises by Gump & Ayers and/or the use of the leased premises by Gump & Ayers.

(b) For and in consideration of the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Gump & Ayers, for itself, its successors and assigns, does hereby fully and forever release, acquit and discharge Union Park, its successors, assigns and any others who have acted or who are acting on its behalf from any and all claims, demands, obligations, liabilities, causes of action or any suits at law or equity, whether known or unknown to Gump & Ayers which Gump & Ayers may have against Union Park which claims arise from any act or omission of Union Park, the Lease Agreements specified in paragraphs Nos. 1 and 2, above, the occupation of the leased premises by Gump & Ayers and the use of the leased premises by Gump & Ayers.

5. Rescission of Lease. For the consideration of the covenants contained herein, the parties agree that the lease agreements specified in paragraphs nos. 1 and 2, above, are hereby mutually rescinded and that except as provided in this agreement, both parties are hereby released from any and all obligation contained within said lease agreements.

6. Default. In the event Gump & Ayers shall default in a payment of $10,000.00 due on December 15, 1988 as set forth in paragraph 3 above, such payments shall be subject to a late charge at a rate equal to 18 percent per annum until paid. Any default in the payment of any sum set forth in the Promissory Note shall be subject to the late fee as set forth within the Promissory Note. In the event either party defaults in the performance of any term of this Agreement, the defaulting party agrees to pay all reasonable attorney's fees and court costs incurred by the non-defaulting party.

The mutual releases contained herein and the mutual recision of the Lease Agreements contained herein are dependant upon the full performance by Gump & Ayers of its obligations contained in this Agreement and contained in the Promissory Note. In the event Gump & Ayers defaults in any of its obligations set forth in this Agreement or the performance of any obligation set forth in the Promissory Note, Union Park Associates shall be entitled, by its election, to retain all funds received prior to the default and to either (1) its actual damages under the Lease Agreements less all funds received under this Agreement and Promissory Note prior to the default or (2) the full consideration as provided in this agreement and the Promissory Notes.

7. Union Park and Gump & Ayers acknowledge that this

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compromise and release has been entered into freely and with the advice of counsel and that no representations of fact or opinion has been made by either party or by anyone acting in their behalf to induce this compromise with respect to the nature of their claims and damages.

DATED this 7th day of ~~November~~ DECEMBER, 1988.

UNION PARK ASSOCIATES

By Thomas M Lloyd

GUMP & AYERS REAL ESTATE, INC.

By Jerry A. Doan
President

ld uniogump.rel

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Tab F

PROMISSORY NOTE

$55,000.00
Principal Amount

December ~~November~~ 7, 1988

FOR VALUE RECEIVED, the undersigned hereby promises to pay to the order of UNION PARK ASSOCIATES, 6925 Union Park Center, Suite 500, Midvale, Utah 84047, the sum of FIFTY FIVE THOUSAND AND NO/100 DOLLARS ($55,000.00). This note shall bear interest at the rate of ten percent (10%) from and after May 1, 1988.

Said sum shall be due and payable to the holder hereof in eighteen (18) monthly payments of principal in the amount of $3,055.55 plus accrued interest as of the date of each such payment.

Said payments to be made as follows: Payments shall commence on May 1, 1989 and continue thereafter, on the first day on each successive month, through and including the month of October, 1989. No payment shall be due for the months of November, 1989 through April, 1990. Thereafter, payments shall be due, as stated above, commencing on May 1, 1990 and continuing thereafter, on the first day of each successive month through and including the month of October, 1990. No payment shall be due for the months of November, 1990 through April, 1991. Thereafter, payments shall be due as stated above, commencing on May 1, 1991 and continuing thereafter on the 1st day of each successive month until all principal and accrued interest is paid in full.

This note may be prepaid in whole or in part without penalty.

This note shall at the option of any holder hereof be immediately due and payable upon the occurrence of any of the following:

1. Failure to make any payment due hereunder within 15 days of its due date.

2. Breach of any condition of the Security Agreement on property granted as collateral or security for this note.

3. Upon the filing by the undersigned of an assignment for the benefit of creditors, bankruptcy, or for relief under any provisions of the Federal Bankruptcy Code; or by suffering an involuntary petition in bankruptcy or receivership to be filed and not vacated within 30 days.

In the event this note shall be in default, and placed with an attorney for collection, then the undersigned agrees to pay all reasonable attorney fees and costs of collection. Payments

EXHIBIT F

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not made within five (5) days of due date shall be subject to a late charge of 1.5% of said payment. All payments hereunder shall be made to the address set forth above or to such address as may from time to time be designated by any holder hereof.

The undersigned agrees to remain fully bound hereunder until this note shall be fully paid. The undersigned further waives demand, presentment and protest and all notices thereto and further agrees to remain bound, notwithstanding any extension, modification, waiver or other indulgence by any holder or upon the exchange, substitution, or release of any collateral granted as security for this note. No modification or indulgence by any holder hereof shall be binding unless in writing; and any indulgence on any one occasion shall not be an indulgence for any other future occasion. The rights of any holder hereof shall be cumulative and not necessarily successive. This note shall be construed, governed and enforced in accordance with the laws of the State of Utah.

This note is subject to a Security Agreement of even date.

GUMP & AYERS REAL ESTATE, INC.

By _____
JERRY FLOOR, President

ld uniogump.not

000109

Tab G

Mark S. Swan - 3873
David W. Overholt - A3846
RICHER, SWAN & OVERHOLT, P.C.
A Professional Corporation
311 South State Street
Suite 350
Salt Lake City, Utah 84111
Telephone: (801) 539-8632
Attorneys for Plaintiff
Union Park Associates

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

UNION PARK ASSOCIATES, a Utah Limited Partnership,	:	PLAINTIFF'S ANSWERS TO DEFENDANT'S SECOND SET OF INTERROGATORIES
Plaintiff,	:	
v.	:	
GUMP & AYERS REAL ESTATE, INC.,	:	Civil No. 900906725 CV
Defendant.	:	Judge: Anne M. Stirba

INTERROGATORY NO. 1: How much of the square footage involved in the leased premises was included in the 10,039 square feet leased to Matrix Funding Corporation on November 23, 1988?

ANSWER: All of the square footage of the leased premises was included in the space leased to Matrix Funding Corporation by lease dated November 23, 1988 and occupied January 1, 1989.

INTERROGATORY NO. 2: Apart from Matrix Funding Corporation, Miles, Inc. and Rhone-Poulenc, Inc., has any person or

entity occupied, used or benefitted from all or any portion of the leased premises since May, 1988? If so, answer the following:

(a) The name of the person or entity who occupied, used or benefitted from the leased premises;

(b) The date said person or entity occupied, used or benefitted from the leased premises;

(c) Describe the nature of the occupancy, use or benefit.

ANSWER: Assuming that Gump & Ayers left the leased premises in May, 1988, which they apparently dispute, Plaintiff is unaware of any other person or entity which occupied the leased premises since that date, other than the entities listed by Defendant.

INTERROGATORY NO. 3: State all facts upon which you rely in support of your claim that Plaintiff was "forced" to make improvements as noted in Paragraph 30 of the Affidavit of Thomas Lloyd. With respect to each such fact, answer the following:

(a) The name and address of the person who has or claims to have personal knowledge as to such facts;

(b) Identify any documents which you claim support the existence of any such facts.

ANSWER: Defendant is obviously troubled by the use of the word "forced" in the Affidavit of Thomas Lloyd. This word was chosen as the best explanation of the commercial necessities to

improve and modify the leased premises to make it suitable to the incoming tenant. One factor that led to the need to make improvements is the fact that the occupancy of the Defendant of the space had caused a certain amount of wear and tear which was not acceptable to the prospective tenant. Furthermore, Gump & Ayers had a distinctive decorating scheme, with colors of black and green, which was not acceptable to the incoming tenant. Consequently, the decorating scheme was not usable by any other perspective tenant. Further, it is standard in the industry for the landlord to make leasehold improvements to the lease space to accommodate the needs of the incoming tenant. Consequently, when Matrix Funding negotiated for the lease space, they negotiated for certain changes to the space, including new carpet, a change in walls and other similar items. These items of improvements were specifically negotiated and were minimized in order to keep the cost of the improvements down, without having to pass those costs through to the new tenant.

Union Park, as a landlord, also had a legal duty to mitigate its damages by the re-letting of its premises. Because a landlord must take positive steps to re-let the premises, the cost associated with the readying of the property for re-letting of the premises, is its necessary, more often than not, to incur costs of repairs and alterations to meet the needs of a new tenant.

Therefore, the commercial realities and the legal duties combined to "force" Plaintiff to make improvements to the property.

Those persons which have knowledge of the negotiations and factors concerning the improvements are Tom Lloyd, of Terra Industries and Richard Emery of Matrix Funding. Tom Lloyd's address is 6925 Union Park Center, Suite 500, Midvale, Utah 84047, and Richard Emery's address is 6925 Union Park Center, Suite 250, Midvale, Utah 84047. Plaintiff is not aware of any documents which exist regarding the negotiations between Plaintiff and Matrix Funding for the improvements made to the property as those improvements were orally negotiated. Plaintiff does have copies of documents that relate to the cost of the improvements, which Defendant may obtain upon request.

INTERROGATORY NO. 4: State all facts upon which you rely in support of your claim that Plaintiff was "forced" to renegotiate the lease with Matrix Funding Corporation as noted in Paragraph 28 of the Affidavit of Thomas Lloyd. With respect to each such fact, answer the following:

(a) The name and address of the person who has or claims to have personal knowledge as to such facts;

(b) Identify any documents which you claim support the existence of any such facts.

ANSWER: Again, Defendant seems troubled by the use of the

word "forced". Perhaps a better phrase would have been "commercially necessary". It is a usual course of business for a landlord to re-lease property at the then-prevailing lease rates. Consequently, when negotiations began for the leasing of the premises with Matrix Funding, the current market value of that space was taken into account. Other factors included the need to meet Matrix Funding's existing needs, an attempt to find the best available tenant, the size of the space, how quickly a tenant could be located to minimize the impact of loss of lease revenues, and the fact that relatively minor renovations were incurred in conjunction with the improvement of this lease space for Matrix Funding. It is the opinion of Tom Lloyd, who has been in the business for sixteen (16) years and who has negotiated numerous leases at Union Park Plaza, that the lease with Matrix Funding in November, 1988 was set at the relevant market rent, given all of these factors.

Persons who have knowledge of the negotiations and factors concerning the negotiation of the Matrix Funding Corporation lease are Tom Lloyd of Terra Industries and Richard Emery of Matrix Funding. Tom Lloyd's address is 6925 Union Park Center, Suite 500, Midvale, Utah 84047. Richard Emery's address is 6925 Union Park Center, Suite 250, Midvale, Utah 84047. Plaintiff is not aware of any documents which exist regarding the negotiations between

Plaintiff and Matrix Funding for the lease rate as those negotiations were all done orally.

INTERROGATORY NO. 5: State the name and address of each and every person or entity who has been a general or limited partner and every person or entity who has been a general or limited partner in the Plaintiff organization since January 1, 1987.

ANSWER: Plaintiff objects to the scope of Interrogatory No. 5 in that it goes beyond the issues presented in Plaintiff's Complaint for the enforceability of a Settlement Agreement. However, if Defendant were willing to enter into a Confidentiality Agreement with regard to the non-disclosure of the names and persons who are involved as general and limited partners of the Plaintiff, then Plaintiff may be inclined to disclose the information requested by the Defendant.

INTERROGATORY NO. 6: Identify each and every transaction, contract or agreement to which Plaintiff and Matrix Funding Corporation have both been parties since January 1, 1987. Include in your answer the following:

(a) The date of the transaction, contract or agreement;

(b) Identify all documents arising out of or in any manner connected with each transaction, contract or agreement.

ANSWER: The only transaction between Plaintiff and Matrix

Funding is the lease entered into dated November 23, 1988 of the former premises of Gump & Ayers Real Estate, Inc., which is the subject of this litigation. Defendant has all the documentation regarding that lease transaction.

INTERROGATORY NO. 6 (sic): Has Plaintiff and Matrix Funding Corporation had any common employee since January 1, 1987? If so, answer the following:

(a) The name and address of the common employee;

(b) The nature of the services performed by said employee for Plaintiff;

(c) The nature of the services performed by said employee for Matrix Funding Corporation;

(d) The percentage contribution of Plaintiff and Matrix Funding Corporation to compensation to said person.

ANSWER: No.

INTERROGATORY NO. 7: Since January 1, 1987, has Plaintiff and Matrix Funding corporation shared office space or facilities? If so, answer the following:

(a) Describe the shared office space;

(b) State the dates the office space was shared;

(c) Describe the financial arrangement with respect to the shared office space;

(d) Describe the facilities that were shared;

(e) State the dates the facilities were shared;

(f) Describe the financial arrangement with respect to such sharing arrangement.

ANSWER: No.

DATED this 27th day of August, 1991.

UNION PARK ASSOCIATES, a Utah Limited Partnership,

By: Thomas M Lloyd
Thomas Lloyd, General Partner

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

On the ____ day of August, 1991, personally appeared before me Thomas Lloyd, General Partner of Union Park Associates, a Utah Limited Partnership, after being first duly sworn upon oath, acknowledged to me that said individual has read the foregoing instrument, believes the contents thereof, and executed the same of the individual's free act and desire.

SUBSCRIBED and SWORN to before me this 27th day of August, 1991.

JOYCE PAPPAS
Notary Public
STATE OF UTAH
My Commission Expires
February 28, 1994

Joyce Pappas
NOTARY PUBLIC
Residing in Salt Lake County

My Commission Expires:
Feb. 28, 1994

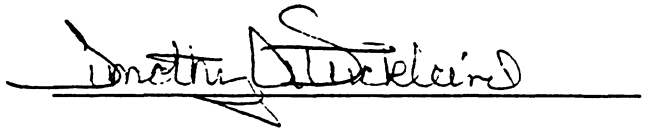
RICHER, SWAN & OVERHOLT, P.C.

By: Mark S Swan
Mark S. Swan
Attorney for Plaintiff
Union Park Associates

CERTIFICATE OF SERVICE

I hereby certify that on the 30TH day of August, 1991, I caused a true and correct copy of the foregoing to be served upon the following parties by placing the same in the United States mails, postage prepaid, addressed as follows:

Robert M. McDonald
McDONALD & BULLEN
Attorneys for Defendant
Hermes Building
455 East 500 South
Suite 200
Salt Lake City, Utah 84111



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